
(2008) 09 DEL CK 0300

In the Delhi High Court

Case No : O.M.P. No. 47 of 1996 and I.A. No's. 3974-75 of 1998

Sun Air Hotels Ltd.

APPELLANT

Vs

New Delhi Municipal Council

RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

Citation : (2008) 3 ARBLR 659

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Amit Sibal Atul Sharma Ajay Saroya and Harjyot S. Bhalla, for the Appellant; Rajesh Mahajan and Raghu Tandon, for the Respondent

Judgement

Reva Khetrapal, J.—The petitioner-Sun Air Hotels Ltd. seeks to challenge the award dated 14th March, 1996 passed by the learned arbitrator Shri P.K. Dave, the then Lieutenant Governor, Delhi on the ground that the learned arbitrator has travelled beyond the scope of reference and has accordingly misconducted the proceedings.

2. A few background facts may be narrated in order to decide the issues involved in the present petition. The petitioner is a public limited company, which was allotted a site to construct a hotel of not less than 3 star standard, at Mandir Marg, New Delhi in the year 1977. The said allotment was made out of a successful bid at an open auction. When the petitioner commenced construction, the allotment was cancelled. In view of the earlier allotment, however, another site measuring 7109 sq. yds., i.e. 80,000 sq. feet was allotted to the petitioner on 09.12.1982 at Gole Market, New Delhi. An agreement called a licence deed was executed on 08.12.1982, whereby NDMC land measuring 80,000 sq. feet with FAR 125, at a licence fee of Rs. 34,01,400 (Rupees Thirty four lakhs one thousand four hundred only) per annum was given to the petitioner for the construction of a 3 star hotel to be built by 31st October, 1986. Out of the initial licence fee for the first year, a sum of Rs. 2,23,483.30 (Rupees Two lakhs twenty three thousand four hundred eighty three and thirty paise only) was paid and a

sum of Rs. 10 lakhs was payable within fifteen days from the date of the agreement. Admittedly, the petitioner paid this amount on the very next date, that is, on 09.12.1982. The petitioner was, however, not given the full extent of land and initially only 34,000 sq. feet of land was given, as the balance area was in possession of the Post and Telegraph Department. Till the year 1988, nothing came out of the petitioner's request for possession of the balance area.

3. On 1st February, 1988, a supplemental agreement was executed, whereby the NDMC (respondent herein) agreed to hand over possession in full of the entire area, and it was agreed that licence fee was payable only from the date possession in full was given to the petitioner. The FAR was also increased to 150 and the annual licence fee was enhanced pro rata to Rs. 49.90 lakhs. The balance licence fee was paid on the same day, i.e. 1st February, 1988, bringing the total payment of the licence fee to Rs. 49.90 lakhs, being the advance annual licence fee. There was a moratorium for the payment of the licence fee for two years after the handing over of the possession of the entire land for the purposes of enabling the petitioner to raise the construction on the land allotted. The licence fee for those two years was to be paid in ten half yearly instalments in order to facilitate the construction of the hotel expeditiously. The first instalment of the deferred payment was payable along with the licence fee falling due in the month of January 1991. The respondent also agreed to allot another 1,60,198 sq. feet in addition to the earlier allotted area of 71,098 sq. yds. The construction of the hotel building was to be completed within three years from the date of handing over the possession of the land.

4. The NDMC, however, did not deliver possession of a portion of a land measuring 922 sq. feet. According to the petitioner, this was a crucial piece of land, without which the petitioner could not be permitted to use the building as a hotel building by the Chief Fire Officer. Since the liability to pay the licence fee arose only on the delivery of the possession of the full land, the petitioner did not pay further licence fee to the respondent.

5. On 10.05.1988 and 15.06.1988, the respondent-NDMC vide letters of the aforesaid dates to the Government of India, stated that non-delivery of the remaining land, occupied by the P&T Department, may create hindrance for construction of the hotel, besides loss of revenue to the respondent as the licence fee was to commence only from the date of handing over the possession of the complete land.

Interestingly, while on the one hand the respondent wrote to the Government of India about the loss of revenue being caused to it as the licence fee was to commence only from the date of the handing over of the possession of the complete land to the petitioner, on the other hand the respondent exhibited a belligerent attitude towards the petitioner. On 12.07.1988, the respondent wrote to the petitioner that the non-availability of the remaining land, measuring 922 sq. feet, should not create any hindrance for the construction of the hotel building. A similar letter was again sent to the petitioner on 18.10.1988, insisting

that licence fee for the area handed over should be paid with effect from 02.02.1988. On 20.04.1990, the respondent asked the petitioner to execute another supplemental agreement, failing which the allotment would be cancelled. And on 10.07.1990, the NDMC issued the impugned letter to the petitioner cancelling the allotment.

6. The petitioner challenged the cancellation of the allotment by filing a writ petition in this court, being CWP No. 2197/1990. On the same day, i.e. on 10.07.1990, a Division Bench of this court stayed the operation of the letter dated 10.07.1990. On 17.01.1991, the respondent, through its counsel, sought time to seek instructions regarding delivery of possession of the remaining land measuring 922.82 sq. feet, and on 27.02.1991, the court was informed by the counsel for the respondent that steps were being taken to take possession of the remaining portion after demolishing the existing structure. Thereafter, the matter was adjourned on 05.04.1991 because the respondent's counsel sought time to settle the matter. In the meantime, the validity period of the sanction plan expired. On 25.04.1991, the respondent's counsel agreed before the court to revalidate the plan and to restore electricity within a week. On 30.05.1991, it was recorded by the court that the Chief Fire Officer was not prepared to relax the mandatory requirement of an 8 metre perimeter around the hotel. On 31.07.1991, the court directed the respondent to issue No Objection Certificate as required by IFCI within ten days in terms of Clause 5 of the agreement. On 04.02.1992, the court directed the Director of Estates to attend the court to point out the alternative site which could be allotted to the petitioner, and also to explain the steps taken to hand over the remaining portion of the land. On 03.03.1992, it was recorded that some formalities for handing over the full possession of the plot were yet to be completed. It was also recorded that the NDMC had issued a letter of "No Objection Certificate" to IFCI to enable the petitioner to obtain the loan, which was not in the required form. Since the NOC was not issued by the respondent in the form in which it was issued to others who were similarly situate, and the same was not acceptable to the IFCI, the petitioner was compelled to move the court by way of CM No. 2153/1992. On 17.03.1992, the court directed the respondent to produce copies of NOCs issued to others. On 30.03.1992, the court further ordered the respondent to issue NOC to the petitioner in the form as had been issued in the case of Le Meridien Hotel within one week and also to revalidate the plan. The said orders were not complied with by the respondent leading to the filing of a contempt petition by the petitioner, being CCP No. 157/1993. Faced with a contempt petition, the respondent decided to comply with the directions of the court. It was on 14.09.1993 that the NOC was eventually handed over to the petitioner, after a delay of over fourteen months.

7. The respondent, in the meanwhile, filed a letters patent appeal, being LPA No. 48/1993 against the order dated 30.03.1992, which was dismissed by the Division Bench. The respondent then filed SLP, being SLP No. 9424/1993 against the order dismissing the LPA. The same was dismissed on 30.07.1993. It was

after the dismissal of the SLP that the NOC was handed over by the respondent on 14.09.1993. In the meanwhile, a revalidation letter had been issued on 11.05.1993 imposing several conditions including a demand for late fee of Rs. 12,94,824 (Rupees Twelve lakhs ninety four thousand eight hundred twenty four only) as stacking charges. The earlier revalidation was valid till 05.04.1993 and the petitioner having filed the revalidation application on 06.04.1993 (as admittedly the 3rd, 4th and 5th of April, 1994 were public holidays) the petitioner's stand was that no revalidation charges were payable. The various conditions imposed for revalidation were however subsequently withdrawn due to the contempt proceedings. But the following endorsement made was not removed even after the dismissal of the special leave petition:

The plans are revalidated subject to the outcome of the Writ Petition No. 2197/1990.

8. Being aggrieved by the aforesaid endorsement, the petitioner filed a second writ petition, being CWP No. 768/1994. This writ petition was finally disposed of by the Delhi High Court along with CWP No. 2197/1990 by its judgment dated 07.10.1994. While disposing of the aforesaid petitions, the High Court issued the following directions:

(i) CWP No. 2197 of 1990 is allowed; the impugned letter (Annexure P1) dated 10.07.1990 is set aside; the respondents are restrained from enforcing the contents of the said letter.

(ii) The question of the licence fee for the period of 2 years subsequent to and commencing from 30.03.1992 shall be referred to the arbitration of the Lt. Governor of Delhi. The NDMC is directed to make the reference in this regard within 8 weeks from today.

(iii) The petitioner shall be permitted to proceed with the construction and commence business on the land in action, if otherwise they are according to law (including the terms of the agreements), subject to the condition, the petitioner pays the licence fees in terms of the agreements for the periods subsequent to the expiry of two years from 30.03.1992 and a sum of Rs. 10 lakhs in token of the licence fee for the first two years commencing with 30.03.1992, all of which shall be subject to the award of the Lt. Governor.

(iv) In addition to the aforesaid sum of Rs. 10 lakhs, petitioner shall also pay the licence fee as and when the liability accrues in terms of the agreements, payable during the years 1995 and onwards, which also, shall be subject to the award of the Lt. Governor.

9. As noted above, the award is sought to be challenged on the sole ground that the learned arbitrator has exceeded the scope of reference and thereby misconducted the proceedings. No other ground was pressed at the time of arguments. A somewhat feeble attempt was also made by the learned Counsel for the respondent-objector, Mr. Rajesh Mahajan, to contend that the High Court

understood the date of commencement of the licence fee to be 30th March, 1992, i.e. the date on which possession of the entire land was handed over to the petitioner and the learned arbitrator has travelled beyond the scope of reference, which was limited to whether or not the petitioner was entitled to moratorium. According to the learned Counsel for the respondent-objector, the learned arbitrator was only to decide the question of moratorium and none other.

10. Mr. Amit Sibal, the learned Counsel for the petitioner-non-objector, in the first instance, urged that no objection was raised before the learned arbitrator that he was going outside the scope of the reference. He further urged that the objection petition filed by the respondent-NDMC does not even contain an averment that the counsel for the respondent-NDMC had raised this objection, but it was not dealt with by the arbitrator.

11. Next, the learned Counsel for the petitioner-non-objector relied upon the judgment of the High Court in CWP Nos. 2197/1990 and 768/1994-Sun Air Hotels Limited v. NDMC and Anr. to urge that the allotment of land by the respondent was inseparably connected and intermingled with the ability of the petitioner to construct a 3 star hotel on the allotted site. Paragraph 38 of the judgment is apposite, which reads as follows:

38. In the instant case, the agreement in question is not merely to allot land to the petitioner; allotment of land is intermingled with the particular purpose of constructing a three star hotel in it and run a hotel. The permission to develop the land in a particular manner cannot be separated from the mere purpose to occupy the land with a liability to pay the licence fee annually.

12. Based on the aforesaid, the contention of Mr. Sibal is that the agreement in question is not merely to allot land to the petitioner; allotment of land is intermingled with the particular purpose of constructing a three star hotel in it and running the said hotel. The permission to develop the land in a particular manner cannot be separated from the mere purpose to occupy the land with a liability to pay the licence fee annually.

13. Again, it is pointed out by Mr. Sibal that in paragraph 20 of its judgment, the High Court noted that the petitioner had paid over Rs. 20 lakhs to IFICI as commitment charges while seeking the loan. Since the NOC was not issued by NDMC in time, the IFICI rejected the loan application and the commitment charges were forfeited. The petitioner thus lost this sum, for no fault of the petitioner.

14. In support of his contention that the learned arbitrator has not exceeded the scope of the reference, the learned Counsel for the petitioner placed reliance also on para 61 of the judgment of the High Court, which reads as follows:

61. Licence fee is payable for the period after handing over possession of the land in full. This was how NDMC itself understood the agreement. Full possession was given to the petitioner on 30.03.1992. But the question of moratorium for

any period subsequent to the date of handing over of possession is a matter of applying the terms of the agreement. There is a specific clause in the agreement for resolving such a dispute by referring the same to the arbitration of the Lt. Governor of Delhi. I do not think, it is proper for this court to go into the said question. The writ jurisdiction is normally not available to resolve disputes arising out of the terms of an agreement. However, in the circumstances of the case, and the delay occasioned by the unreasonable attitude of the NDMC, the petitioner should be permitted to proceed with the construction and on completion commence business (if otherwise construction and completion are according to law); petitioner shall also pay the licence fee for the years 1995 and thereafter in terms of the agreement subject to any modification that may be decided by the Lt. Governor. The liability of the petitioner for the years 1993 and 1994 (that is for the two years on handing over possession) and the moratorium thereon and any other modifications or concessions regarding the subsequent years shall be determined by the Lt. Governor in the reference for arbitration in this regard. However, petitioner shall have to pay some amount towards those two years commencing from 30.03.1992, which as an interim measure, I compute at Rs. 10 lakhs as a condition for commencement of further works. This payment, again, will be subject to the decision of the Lt. Governor.

15. Reference was next made by Mr. Sibal, the learned Counsel for the petitioner, to paragraph 8 of the award dated 14.03.1996, which sets out the basic issues to be decided between the parties and reads as follows:

8. Therefore, the basic issues to be decided are:

(i) the date of commencement of the liability of the respondent in regard to the payment of licence fee for the entire plot;

(ii) whether the respondent is entitled to the facility of any moratorium after the commencement of the liability for payment of the licence fee.

Counsel for both parties had agreed before me that only the above two issues may be the subject matter of this arbitration.

16. Relying upon paragraph 8 of the award and the judgment of the High Court, Mr. Sibal contends, and, to my mind rightly so, that the counsel for the objector having agreed that the scope of the reference was encompassed by the aforesaid two issues, it was estopped from contending otherwise.

17. After hearing the rival submissions of the parties at considerable length, I am of the view that by no stretch of imagination, it can be said that the learned arbitrator in any manner exceeded the scope of reference. The learned arbitrator, after noticing that full possession of the land was given to the petitioner on 30th March, 1992 and after noting the contention of the learned Counsel for the petitioner that the licence fee should be payable from the date the building plans were revalidated, i.e. 12.01.1995, held as follows:

13. I find that, though the supplemental agreement came into effect from

01.02.1988, the remaining strip of land was actually handed over on 30.03.1992. This remaining piece of land, as it appears, was crucial to the respondent's commencement of business and without it, it would not have been possible for it to get necessary clearances from the authorities, in particular the C.F.O. This issue has been gone into in detail during the deliberations before the Delhi High Court after which it has been settled that there is no question of any liability prior to 30.03.1992.

14. xxx xxx xxx

15. xxx xxx xxx

16. While seeming to allow construction to proceed till the writ petition was decided, it is a matter of record that the respondent did try to carry out some construction work, but the respondent was again restrained by the NDMC vide its letter dated 12.07.1994. This letter of 12.07.1994 pointed out that the revalidation of the plans was subject to the result of the Writ Petition No. 2197/1990 and further stated "you are also advised not to undertake construction till the decision of the court". This totally unconscionable behaviour of the NDMC makes it entirely unjustified on their part to lay any claim in respect of licence fee w.e.f. 30.03.1992. It is clear that the petitioner was unfairly and deliberately restrained from proceeding with the construction till 07.10.1994, i.e. the date of disposal of the writ petition by the Delhi High Court. As the petitioner had sought the allotment of the said land for the construction of a hotel, the allotment made to him was all along meaningless because the NDMC saw to it that no construction could proceed. Therefore, to make any claim in respect of the licence fee prior to 07.10.1994 would be unfair and unjust. Further, pursuant to the above said order of 07.10.1994 of Delhi High Court, the building plans for the hotel projects were revalidated w.e.f. 12.01.1995. This long delay, as has been discussed in detail above, was entirely because of the unreasonable obstacles placed in the way of the project by the NDMC. I, therefore, hold that the liability of paying the licence fee should commence from the date of revalidation, viz. 12.01.1995 when the respondent could be deemed to be released from the uncalled for constraints placed on him by NDMC. The token payment of Rs. 10 lakhs ordered by the High Court for the first two years commencing from 30.03.1992, which is also subject to this award, shall be set off against the licence fee calculated as from 12.01.1995 as decided by me above.

17. xxx xxx xxx

18. ...I am inclined to maintain the moratorium at the agreed 2 years stipulated in the supplemental agreement of 1988 and subject to all the conditions in Clause 5 of that agreement. I do not consider the cases of Bharat Hotel Ltd. and C.J. International Hotel Ltd. as precedents in deciding the issue. In other words, the moratorium shall extend from 12.01.1995 to 11.01.1997. The repayment shall start thereafter in the ten instalments as originally stipulated.

18. The Division Bench, as already stated, had noted that the licence agreement

in the instant case was more of a licence granted to do a hotel business after putting up a hotel building for the aforesaid purpose, than an ordinary licence, granted to enable the licensee to use its land to put up a hotel building (paragraph 18 of the judgment). It had further noted in paragraph 27 of the judgment that the purpose of Clause 5 of the supplemental agreement was to grant moratorium in the payment of annual licence fee in order to facilitate the construction of the hotel. The period of construction was implied to be two years; even in the first agreement, there was a similar moratorium for two years. The scheme of the two agreements, it was observed, was quite clear. Possession of the entire land was to be handed over to the petitioner, who would take steps to start the construction and complete it within two years. The annual licence fee for these two years was to be paid only thereafter in half yearly instalments. Interest was not payable in case instalments were paid properly. But, the petitioner was not handed over a crucial portion of the plot measuring 922 sq. feet, and the High Court had noted that the petitioner had placed material on record to show that the Chief Fire Officer had been insisting that the building could not be used as a hotel, unless there was a 8 metre maintenance corridor around the building independent of the parking and other facilities. It was undisputed that without the 922 sq. feet area, which remained unallotted, the building as per the sanctioned plan could not be used as a hotel, in view of legal requirement as to the vacant area to be left around the building. The High Court also noted the belligerent attitude being adopted by the NDMC in demanding its licence fee and calling upon the petitioner to enter into and execute a supplemental agreement, despite the NDMC having no power to demand and insist upon the petitioner executing any supplemental agreement. The court also noted the manner in which the NDMC demanded late fee despite the fact that no late fee was payable, and the unconscionable behaviour of the NDMC in making the endorsement that the plans had been revalidated subject to the outcome of Writ Petition No. 2197/1990, and in writing to the petitioner that they were advised not to undertake construction till the decision of the court.

19. In view of the aforesaid, I see no infirmity in the award dated 14th March, 1996. The contention of the objector that the said award is outside the scope of the reference is wholly devoid of substance in view of the fact that the NDMC itself consented to the issues framed by the learned arbitrator in the course of the arbitral proceedings. The raising of objections as to the scope of jurisdiction of the arbitrator for the sake of raising the same in the present proceedings is clearly mala fide and an abuse of the process of the court. Accordingly, the petition is dismissed with costs of Rs. 20,000 which shall be deposited by the NDMC in the account of the Child Relief and You (CRY), DDA Slum Wing, Bapu Park (Barat Ghar), Kotla Mubarakpur, New Delhi -110003 (Ph. 24651732) within a period of four weeks. Receipt thereof shall be filed by the NDMC within one week thereafter.

20. OMP No. 47/1996 and IA Nos. 3974-75/1998 stand disposed of accordingly.